Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-928

BRIDGEPORT HYDRAULIC CO.
THE LITCHFIELD WATER CO.

Appellants

v.

THE DIVISION OF PUBLIC UTILITY CONTROL WITHIN THE DEPARTMENT OF BUSINESS REGULATION OF THE STATE OF CONNECTICUT

Appellee

ON APPEAL FROM THE SUPERIOR COURT FOR THE JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD

MEMORANDUM IN RESPONSE TO MOTIONS TO DISMISS

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The motions to dismiss focus primarily on matters that are not at issue in this appeal. The parties do not dispute the authority of a state to regulate the price charged by a public utility for its services. This regulation is subject only to the constitutional constraint that the state allow the utility a fair opportunity to earn adequate compensation for the devotion of its property to providing public utility service. The constitutional adequacy of the compensation allowed to a utility for the use of its property in

utility service may be gauged according to tests which have been firmly established by this Court's opinions. *See* J.S. 11.[1]

The accounting regulations at issue in this appeal are those which treat the gains on the sale of appellants' property *that has been lawfully withdrawn from utility service*[2] as part of the compensation appellants receive for the utility service provided by that portion of appellants' property that remains devoted to utility service. If appellants and their investors are not the owners of the entire proceeds of the sale of their property that is no longer being used for utility purposes, as the motions to dismiss filed on behalf of the Division of Public Utility Control and the Division of Consumer Counsel assume, appellants concede that regulatory authorities may allocate the gains from such sales as they see fit. On the other hand, if the proceeds of the sale of property that is not dedicated to utility service belong to appellants and their investors, Connecticut's treatment of those proceeds as compensation received by appellants for the service provided by other portions of their property conflicts with the Fourteenth Amendment and with the holding in *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926). That holding proscribes a regulatory agency from treating a utility's property as if that property were itself part of the compensation that the utility is entitled to have an opportunity to earn in return for the utility service it provides.[3]

[1] "J.S." will be used to refer to the Jurisdictional Statement of appellants Bridgeport Hydraulic Company and The Litchfield Water Company.

[2] The property involved in the appeals by Bridgeport Hydraulic Co. and The Litchfield Water Co. from rate decisions of the Commission was sold by appellants. J.S. 36a, 77a. The accounting regulations at issue apply to the proceeds of property that has been sold. J.S. 94a. Such sales are prohibited unless they receive prior approval from the appropriate regulatory authorities. C.G.S. §§ 16-43, 16-50c.

[3] The principle of *New York Telephone* cannot be restricted, as the motion to dismiss of the Division of Public Utility Control would have it, to a ban on so-called retroactive rate making. If the proceeds from the sale of land that has been lawfully removed from dedication to public service are owned by appellants and their investors, appellants are free to use those proceeds for any lawful purpose. Yet, as the Division of Public Utility Control recognizes, by treating those proceeds as compensation for the provision of utility service, the Connecticut regulatory scheme compels appellants to use the proceeds in their "ongoing operations". Motion to Dismiss at 10. Thus, by treating a utility's property as if it were part of the compensation received by the utility for the public service provided by other portions of that utility's property, Connecticut's accounting regulations effect a compulsory *and uncompensated* dedication of appellants' property to utility service. As *New York Telephone* makes clear, the Fourteenth Amendment does not allow this result.

Thus, the central issue presented by this appeal is whether appellants own all of the proceeds from the sale of land that has been lawfully removed from dedication to public utility service. Decision of this issue was recognized as necessary to its holding both by the superior court below, J.S. 14a-17a, and by the opinion of the United States Court of Appeals for the District of Columbia Circuit on which the superior court relied, *Democratic Central Committee v. Washington Metropolitan Area Transit Commission,* 485 F.2d 786, 800-806 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 935 (1974). Appellants' Jurisdictional Statement has demonstrated that those courts erred when they rejected the "basic legal and economic thesis . . . that utility assets . . . remain exclusively the property of the utility's investors," —a thesis based on "[t]he precept of private ownership historically pervading our jurisprudence . . .," 485 F.2d at 800— in favor of the conclusion that the ownership interest of the utility and its investors in a utility's property, even after that property is no longer used for utility service and has been removed from rate base and sold, is restricted to the amount of the original investment in that property. *Id.* at 801.

The motions to dismiss simply elide this fundamental issue. The appellees are content to argue that if appellants' property has not been physically taken and if appellants are authorized to sell their property, then the fact that the regulations require the gain from the sale to be allocated to rate payers does not constitute a deprivation of property without due process of law. The appellees do not recognize that there is no constitutional difference between (i) a state condemning land without providing just compensation, and (ii) a state, after sale of land by a property owner, depriving the owner of the gain obtained from the sale. The ap-

pellees make no effort to defend the flawed reasoning on which the court below and the District of Columbia Circuit relied, nor do they attempt to provide any other justification for their premise that appellants and their investors do not own the full monetary equivalent of the property which they have sold. Rather, appellees simply assert that there is no constitutional bar to treating the money appellants have received in exchange for their property as if it were compensation received by appellants for the use of other property that remains dedicated to public utility service.

If the motions to dismiss are granted, appellees' assertion will become the law of the land without ever having received plenary review by this Court.[4] Appellants respectfully submit that the question presented is sufficiently important, both as a matter of legal doctrine and because of its practical effect on utilities and regulatory authorities throughout the country, to warrant plenary review.

Respectfully submitted,

Appellants
BRIDGEPORT HYDRAULIC COMPANY
THE LITCHFIELD WATER COMPANY

ALLAN B. TAYLOR
and
PALMER S. MCGEE, JR.
Attorneys for Appellants

[4] The constitutional claims raised here were not presented to the Court in *Bridgeport Hydraulic Co. v. Council on Water Company Lands*, 439 U.S. 999 (1978), *aff'g mem.* 453 F.Supp. 942 (D. Conn. 1972) (3-judge ct.). The district court in that case refused to consider a challenge to the accounting regulations at issue here because of the prohibition on district court action with regard to state utility rates contained in the Johnson Act, 28 U.S.C. § 1342, and because the court believed there to be a ripeness problem in the request for a declaratory judgment. 453 F.Supp. at 952-54.

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